

Ethics Opinion

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QUESTION PRESENTED: Does a contingent fee agreement between a client and a medical consulting organization constitute fee splitting with an attorney, influence an expert witness' testimony, or contribute to the unauthorized practice of law contrary to the Montana Rules of Professional Conduct?

ANSWER: Yes.

FACT SITUATION: The Medical Consulting Organization offers medical-legal consulting services to prepare and litigate medical malpractice and personal injury cases. The firm will prepare medical reports, case strategy, and provide expert witnesses from their consulting staff.

These services are available for a fixed fee or under four contingent fee contracts. The firm maintains these contingent arrangements are American Bar Association approved and are ethical because

1. No fee splitting with an attorney is involved because the contract is between the client and the Medical Quality Foundation.
2. The expert witnesses have no knowledge of the contract, do not benefit from the contract, and their payment is not contingent on the outcome of the case.

ANALYSIS: On August 10, 1976, the American Bar Association Committee on Ethics and Professional Responsibility addressed the identical issue in Informal Opinion 1375, Participation with Lay Consulting Service Charging a Contingent Fee. The ABA approved the use of medical consulting firms on a contingent fee basis if four requirements were met:

1. The lay person or agency was not to engage in the unauthorized practice of law.
2. The lawyer did not share fees with the lay person or agency.
3. The contingent fee was not payable for the testimony of the lay person or agency.
4. The arrangement was not merely a subterfuge for fee splitting between a lawyer and a lay person. Although the ABA relied on the Model Code of Professional Responsibility, the Montana Rules of Professional Conduct may produce substantially the same result. Caution must be exercised, however, in adopting the ABA ruling and approving the contingency arrangements with the Medical Quality Foundation because the potential for exceeding ethical standards and violation the Rules of Professional Conduct is real and perhaps likely.

The Contingency fee contracts proposed by the Medical Quality Foundation raise three issues addressed by Montana's Rules of Professional Conduct and several policy considerations.

1. Fee Splitting. Rule 5.4(a) provides that a lawyer or law firm shall not share legal fees with a nonlawyer (exceptions not applicable). The Medical Quality Foundation maintains that there is no fee splitting because they contract directly with the client and the lawyer merely guarantees

the dispersal of funds. The ABA has determined that if the client is fully aware of this arrangement, and the arrangement is not subterfuge for fee splitting, the Rule is not violated. It should be kept in mind that a lawyer's independent judgment and control over the case must not be influenced by the consulting firm and that the reasonableness of his fee may be affected by delegating out preparation work.

2. Influenced Testimony. Rule 3.4(b) provides that a lawyer shall not offer an inducement to a witness that is prohibited by law. Comment [3] states that it is improper to pay an expert witness a contingent fee.

The Medical Quality Foundation maintains that the experts have no knowledge of the contract, do not benefit from the contract and are not contingent in any way upon the outcome of the case. They are said to be paid fully in advance for their services, and that "(w)e supplement their fees through you."

If in fact the expert's fees are "supplemented" with a proportion of an award, this would constitute an improper payment to a witness. Although an attorney is not making the improper payment to the expert directly, it should not be proper to perpetuate an ethical violation through another. Model Code of Professional Responsibility (no longer valid in Montana) DR 7-109(c) prohibits a lawyer from directly or indirectly paying or acquiescing in payment of compensation to a witness contingent upon his testimony or the outcome of the case. The lawyer may not ignore the possibility that the proposed arrangement may simply be a subterfuge for such a fee. Testimony by employees or shareholders of the consulting services should not be barred. The service is likely to maintain a stable of experts upon which it draws for testimony; they may have a stake in the outcome of litigation due to their repeated utilization and compensation by the service. If the lawyer knows that witness compensation is in essence contingent on either testimony or outcome, he will violate the rule if he permits such testimony. (California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion, 1984-79).

The ABA has approved the arrangement if no testimony from the consulting firm's employees or agents was contemplated in the contract. Whether or not the Medical Quality Foundation's Expert witnesses and consulting staff are employees or agents and have an interest in the outcome of litigation is a factual question which does not automatically make the organization's services unethical; however, it needs to be carefully considered.

3. Unauthorized Practice of Law. Rule 5.5(b) provides that a lawyer shall not assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law.

A lawyer using the service of a consulting firm will not be aiding the unauthorized practice of law if he retains control over the case and is free to accept or reject witnesses based on his own professional judgment.

The Medical Consulting Organization advertises that they "will work with you in developing the medical strategy of your case" Developing the strategy of a case approaches practicing law, so care must be taken to assure that the attorney's independent judgment is not infringed upon.

Additionally, several policy considerations need to be addressed. The ready availability of medical case preparation at no initial cost may add to the increase in medical malpractice cases. On the other hand an indignant plaintiff may only be able to achieve justice through the use of such an organization.

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